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Legislative Notice

Editor, Judy Gorman Prinkey

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S. 1668 — The Disclosure to Congress Act of 1998

Calendar No. 313

Reported from the Select Committee on Intelligence on February 23, 1998, without amendment, by a vote of 19-0. An original bill. S. Rept. 105-165.

NOTEWORTHY

- By a unanimous consent agreement entered into on Friday, March 6, 1998, the Senate will proceed to the consideration S. 1668, the Disclosure to Congress Act of 1998, today at 5:10 p.m. There will be 20 minutes of debate, with no amendments or motions in order, to be followed by two votes: first, a cloture vote related to the Intermodal Surface Transportation Efficiency Act; second, a vote on passage of S. 1668.

- S. 1668 directs the President to inform Intelligence Community employees and contract employees [further described on p. 2] that **it is not prohibited by law, executive order, or regulation to disclose certain information, including classified information, to an appropriate committee of Congress.**

- The Disclosure to Congress Act will make Intelligence Community employees aware that they may disclose certain information to Congress, including classified information, that they reasonably believe is specific and direct evidence of:
  - a violation of law, rule or regulation;
  - a false statement to Congress on an issue of material fact; or
  - gross mismanagement, a gross waste of funds, a flagrant abuse of authority, or a substantial and specific danger to public health or safety.

- The Committee Report [105-165] to S. 1668 states the Committee's view that "the legislation will encourage employees within the Intelligence Community to bring such information to an appropriate committee of Congress rather than unlawfully disclosing such information to the media. It is imperative that individuals with sensitive or classified information about misconduct within the Executive Branch have a 'safe harbor' for disclosure where they know the information will be properly safeguarded and thoroughly investigated."

BACKGROUND

Need for the Legislation

It is not generally known, but the "Whistle Blower Protection Act" *does not cover* employees or contract employees of the agencies within the Intelligence Community, defined in the bill as: the CIA; Defense Intelligence Agency; National Imagery and Mapping Agency; National Security Agency; FBI; and any other Executive agency determined by the President to have as its principal function the conduct of foreign intelligence or counterintelligence activities. Therefore, employees within the Intelligence Community are not protected from adverse actions if they choose to disclose certain information to Congress. In fact, an employee who discloses classified information to Congress without prior approval from the Executive Branch agency is specifically subject to sanctions which may include reprimand, termination of security clearance, suspension without pay or removal. Some types of unauthorized disclosures are also subject to criminal sanctions.

S. 1668 is meant to address this void and address Executive Order No. 12,958 of 1995 that states classified information must remain under the control of the originating agency and it may not be disseminated without proper authorization. Consequently, an Executive Branch employee may not disclose classified information to Congress without prior approval. In fact, employees are advised that the agency will provide "access as is necessary for Congress to perform its legislative function."

As the Committee report notes: "In other words, the executive agency will decide what Members of Congress may 'need to know' to perform their constitutional oversight functions. The President, in effect, asserts that he has exclusive or plenary authority to oversee the regulation of national security information." [Rept. 105-165, p.2]

Last Year's Action

In response to the Administration's views, the FY 1998 Intelligence Authorization Act, [S. 858], reported by the Senate Select Committee on Intelligence, included a section (306) that is similar to S. 1668. The Senate passed last year's authorization bill by a vote of 98-1. Shortly after the vote, the Administration issued a Statement of Administration Policy saying section 306 was unconstitutional and that the bill would be vetoed if the language remained. During conference with the House Permanent Committee on Intelligence (HPSCI), section 306 was amended to express a sense of Congress that Members of Congress have equal standing with officials of the Executive Branch to receive classified information so that Congress may carry out its oversight responsibilities.

The decision not to include section 306 of the Senate bill in the conference report, however, was not intended by either body to be interpreted as agreement with the Administration's position on whether it is constitutional for Congress to legislate on this subject matter. The managers' actions were also not to be interpreted as expressing agreement with the opinion of the Justice Department's Office of Legal Counsel, which explicitly stated that only the

President may determine when Executive Branch employees may disclose classified information to Members of Congress.

While the managers recognized the Chief Executive's derived constitutional authority to protect sensitive national security information, they did not agree with the Administration that the authority is exclusive. Members of both committees also agreed that whatever the scope of the President's authority, it may not be asserted against Congress to withhold evidence of misconduct or wrongdoing and thereby impede Congress in exercising its constitutional legislative and oversight authority.

This Year's Action

The Senate Select Committee on Intelligence held public hearings on February 4 and 11, 1998, to examine the constitutional implications of legislation such as section 306. Following the public hearing on February 11, the Committee marked up a modified version of section 306, the language of which is contained in S. 1668. The Committee passed S. 1668 by a unanimous vote.

BILL PROVISIONS

The bill has one section divided into four subsections (a) through (d).

Subsection (a) (1) directs the President to inform covered employees that it will not be considered an unauthorized disclosure if they provide certain information to Congress if that information is provided to the appropriate member and the information falls within the specified categories. This subsection, however, does not define the means by which the President must implement this direction, intentionally allowing the President a great deal of latitude in implementing the legislation.

In paragraph (1) (B), the President is directed to inform such employees that the individuals that can be given such information have a need to know and are authorized to receive such information. Paragraph (1) (C) is written to ensure that members receive information only in their capacity as a member of the committee concerned and under that committee's rules for safeguarding classified material.

Paragraph (2) defines the type of information that an employee may bring to Congress, and is intended to cover all information in the covered categories, including classified information.

Paragraph (3) refers to the individuals to whom information may be disclosed, while Paragraph (4) recognizes the inviolability of the rule of secrecy in grand jury proceedings.

Subsection (b) directs the President to submit a report to Congress on the actions taken under subsection (a). The Committee expects to see a report that describes any procedures established or guidance given to the various agencies, departments, or elements. If the President gives wide discretion to agency heads, the Committee would also like the report to address how each agency or department has implemented this legislation.

COST

According to the Congressional Budget Office, the costs of implementing S. 1668 would not be significant because the number of employees covered by the bill would be small and the cost associated with each notice would be minimal. Because the legislation would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995, and would not affect the budgets of state, local, or tribal governments.

ADMINISTRATION POSITION

No Statement of Administration Position was available at press time. However, during a Senate Select Committee on Intelligence hearing in February of 1998 to examine the constitutional implications of legislation similar to Section 306 (language included in the original FY 1998 Intelligence Authorization Act, S. 858, which was broader in scope than the language in S. 1668) Randolph D. Moss, Deputy Assistant Attorney General from the Justice Department's Office of Legal Counsel testified in support of the Administration's position that Section 306 and any similar language represents an unconstitutional infringement on the President's authority as Command in Chief and Chief Executive.

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